Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS OF OHIO INTERNET SERVICE PROVIDERS ASSOCIATION, TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION, AND WASHINGTON ASSOCIATION OF INTERNET SERVICE PROVIDERS

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REPLY COMMENTS OF OHIO INTERNET SERVICE PROVIDERS ASSOCIATION, TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION, AND WASHINGTON ASSOCIATION OF INTERNET SERVICE PROVIDERS

The Ohio Internet Service Providers Association ("OISPA"), the Texas Internet Service Providers Association ("TISPA"), and the Washington Association of Internet Service Providers ("WAISP") (collectively, the "ISP Associations"), by their undersigned counsel, submit these reply comments in the above-captioned proceeding examining the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[1]

I. INTRODUCTION AND SUMMARY

In the initial round of comments in this proceeding, only the BOCs support the view that the broadband transmission services that they are currently required to provide to unaffiliated

[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, FCC 02-42 (released Feb. 15, 2002) ("*Notice*").

ISPs on a nondiscriminatory basis pursuant to Title II of the Act should, or could, be converted from common carriage to private carriage. State commissions, the Secretary of Defense, consumer groups, the entire competitive industry, ISPs, and even other ILECs oppose the BOCs' deregulatory proposal floated by the Commission in the *Notice*. While this by itself is a sufficient reason not to move forward with this approach, the record in this and other proceedings demonstrates that conversion of ILEC broadband services to private carriage would not achieve the Commission's broadband goals. Rather than promoting broadband, this would reduce ILEC incentives to construct broadband networks, harm the ability of the competitive industry to construct and build out their own networks, and of ISPs to provide innovative services. In this connection, the recent decision of the Supreme Court definitively invalidated the core of the BOCs broadband public policy initiative when it carefully explained why ILEC obligations to provide unbundled network elements at TELRIC prices does not discourage facilities-based investment by either ILECs or the competitive industry. That decision applied to provision of network elements to the ILECs telecommunications service competitors. There is even less reason to accept the ILECs broadband arguments with respect to their obligation to provide ISPs with nondiscriminatory access to basic telecommunications transmission services. The Commission should use this proceeding to similarly reject BOCs' broadband arguments, which are no more in any event than the latest manifestation of the traditional BOC argument to the effect that if regulators permit them to thwart competition they will provide new services to consumers.

Initial comments also reveal in a striking fashion the error of the definitional approach to deregulation of broadband apparently contemplated in the *Notice*. The *Notice* tentatively concluded that wireline broadband Internet access service is an information service provided via

"telecommunications" but not via "telecommunications service." The *Notice* failed to recognize, as admitted by the BOCs in their initial comments, that in fact wireline broadband Internet access service is offered via telecommunications service because the Commission's own rules compel facilities-based carriers to provide information services as customers of their own tariffed telecommunications services. Thus, the transmission component that BOCs incorporate into their own broadband information services is a telecommunications service. Therefore, the Commission erred in concluding that information services provided by a carrier over its own facilities is not provided via telecommunications service.

Moreover, application of Title II and unbundling requirements to the transmission component of wireline broadband Internet access service is nonetheless consistent with the statutory definitions of "information service." Under the statutory definition, an information service is provided "via telecommunications." However, "telecommunications service" necessarily contains "telecommunications." Therefore, the requirement that BOCs provide information service as customers of their own tariffed telecommunications service means that the information service is also provided "via telecommunications" notwithstanding that it is also provided by means of "telecommunications service." Therefore, the apparent supposition of the *Notice* that the Commission ought to, or must, abolish Title II regulation and *Computer II* and *III* safeguards because of the statutory definition of information service is incorrect and it would be unlawful for the Commission to take those radical deregulatory steps based on that supposition.

Nor is there any other reason or lawful basis for the Commission to abolish Title II regulation of ILEC broadband services, or *Computer II* and *III* safeguards. As explained herein, the Commission does not have the authority to convert ILEC broadband services to private carriage,

and even if it could do so, it should not, because of the strongest possible public interest considerations including prevention of the ILECs ability to systematically discriminate against independent ISPs in order to leverage control of basic transmission services into control of the broadband information services marketplace. Even assuming the existence of substantial intermodal competition from cable operators in most residential markets, which is not the case, removal of Title II and *Computer II* and *III* safeguards from LECs and cable operators would merely permit the establishment of an undesirable duopoly in the residential broadband information services marketplace rather than a fully competitive market. Of course, the business market for such services, which the BOCs actively market and serve with DSL, would not even have duopoly competition. Thus, at most, BOC arguments concerning intermodal competition show a possible duopoly in provision of consumer Internet access service and virtually no competition in broadband business services.

The *Cable Modem Declaratory Ruling* does not provide any basis for regulation of the transmission component of wireline broadband Internet access service as private carriage. At a minimum, the Commission erred in that decision in determining that cable operators that provide telecommunications services, such as voice telephone service, are not already subject to Title II and *Computer II* and *III* unbundling obligations. This is because the Commission's existing rules require all facilities-based carriers to provide information services as customers of their own nondiscriminatory unbundled offering of underlying transmission service. Thus, because cable operators are carriers by virtue of providing voice telecommunications, they are subject to Title II and unbundling obligations, just like ILECs. Although the Commission's waiver of *Computer II* and *III* unbundling obligations was also erroneous because the Commission did not

obtain a record for a waiver, or adequately address its own standards for waiver under *WAIT Radio*, the waiver at least was correctly premised on the view that Title II and *Computer II/II* were applicable to cable operators.

Moreover, with respect to cable operators that do not provide telephone service, even assuming that the Commission's application of the statutory definitions to them is correct, they are distinguishable from wireline providers because the latter are already subject to Title II. As stated above and explained further in these comments, the latter are required under the Act and the Commission's rules to unbundle transmission services from their information service offerings and the Commission may not under the Act remove that requirement on the basis of the statutory definitions. Therefore, the *Cable Modem Declaratory Ruling*, contrary to BOC arguments, does not provide any guidance for issues raised in this proceeding.

The Commission should also reject BOC arguments that a consistent regulatory approach to broadband requires that the transmission component of wireline broadband Internet access service be shifted to Title I regulation. While the unfortunate and erroneous *Cable Modem Declaratory Ruling* must be rescinded, the Commission may create a consistent regulatory framework by maintaining its requirement that all facilities-based carriers, including those also providing video programming subject to Title VI, are subject to Title II and *Computer II* and *III* unbundling obligations. This would not preclude creation of a suitably deregulatory approach to telecommunications, or necessarily require that all carriers bear equal regulatory burdens, because the Commission may forbear from application of Title II obligations as appropriate.

For these reasons, the Commission should affirm continued application of Title II and *Computer II/II* safeguards to the transmission component of wireline broadband Internet access service.

II. THE *CABLE MODEM DECLARATORY RULING* DOES NOT PROVIDE GUIDANCE FOR THIS PROCEEDING

A. Existing Discriminatory Practices Do Not Justify "Private Carriage"

The BOCs' principal argument in their initial comments is that the *Cable Modem Declaratory Ruling* requires that the Commission convert current Title II regulation of the transmission component of wireline broadband Internet access service to "private carriage."[2] In the *Cable Modem Declaratory Ruling*, the Commission determined that cable modem service is a single offering of an information service without a separate offering of a telecommunications service, based on a detailed factual examination of cable operators' current practices. The Commission stated that, "[w]e are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[3] On the other hand, cable operators did provide "open access" to some ISPs, but declined to do so for others. Therefore, the Commission concluded *as a matter of fact* that cable operators have not made a common carrier offering of broadband transmission services but instead at most engaged in "private carriage." The Commission concluded that cable operators were not required to make a nondiscriminatory offering

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[2] SBC at 16-17; BellSouth at 11-12; Verizon at 4. (Comments filed in this proceeding on May 3, 2002, are cited solely by the name of the filing party.)

[3] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling*, Declaratory ruling and Notice of Proposed Rulemaking, FCC 02-77, GN Dkt. No. 00-185, CS Dkt. No. 02-52, at ¶40 (rel. Mar. 15, 2002).

of their broadband telecommunications capability because they were only engaged in private carriage.

This approach was erroneous as applied to cable operators, because it permits the regulated entity to self-select its own mode of regulation simply by acting in its preferred way. In essence, the Commission concluded in *the Cable Modem Declaratory Ruling* that cable operators should continue to be free to discriminate against small ISPs by denying them access, and among other ISPs by dealing with them on different terms and conditions, because this is what cable operators were currently doing. Totally missing from the Commission's evaluation is a recognition that the Commission is charged with responsibility for regulating in the public interest and may compel cable operators to make a nondiscriminatory offering of their broadband telecommunications offering.[4] Because the Commission failed to perform any serious public interest evaluation of whether cable operators should be subject to nondiscrimination obligations, instead limiting itself to the role of passive observer of cable operators current discriminatory practices, the *Cable Modem Declaratory Ruling* was arbitrary and unlawful. This by itself is sufficient

[4] As the Commission recently recognized in a different decision, "There are two ways to determine that a communications service qualifies as a common carrier service. A communications service will be considered a common carrier service if: (1) a common carrier holds out the service to the general public on a common carrier basis or (2) the Commission finds that it is "necessary or desirable in the public interest" for the service to be provided on a common carrier basis. *See NARUC v. FCC*, 525 F.2d 630, 641, 644 n.76 (D.C. Cir. 1976) (*NARUC I*); *see also NARUC v. FCC*, 533 F.2d 601, 608-9 (D.C. Cir. 1976) *(NARUC II)* (binding requirement by agency that company provide service on indifferent basis is adequate to confer common carrier status)." *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 16 FCC Rcd 15435 at para. 71, n.179 (2001), *aff'd, Verizon Tel. Cos. v. FCC,* No. 01-1371 (D.C. Cir. June 18, 2002). The *Cable Modem* ruling erroneously relied solely on the first prong of the *NARUC I* test and failed to consider the second. The Commission should not compound this error by repeating it in this proceeding.

reason to reject the *Cable Modem Declaratory Ruling* as providing any guidance for this proceeding.

Moreover, even assuming the legal analysis in the *Cable Modem Declaratory Ruling* were sufficient, the factual basis for that decision is not applicable to wireline carriers. The Commission's classification of cable modem service as private carriage was based on specific factual findings relating to the past and present conduct of cable operators. It is uncontested that ILECs have held out to the public, as common carriers, a so-called "wholesale" offering of broadband transmission[5] services that are in every way identical to the transmission capacity they would use in offering "integrated" broadband Internet access. This fact alone clearly distinguishes the present case from the *Cable Modem* proceeding, and renders the *Declaratory Ruling* inapplicable as a precedent.

B. Imposition of Non-Discrimination Safeguards Under Title I Is An Oxymoron

In the *Cable Modem Declaratory Ruling*, the Commission determined that cable broadband transmission service was subject to Title I but nonetheless called for comment on whether it should impose nondiscrimination obligations under Title I. However, it is the very nature of "private carriage," as described by the Commission, that the carrier may choose whether, and on what terms, to deal with customers on an individualized basis. On the other hand, common carriage subject to Title II is characterized by offering of service on nondiscriminatory terms and conditions. In short, if the Commission were to impose an obligation on cable operators to provide broadband transmission services on a nondiscriminatory basis, which it

should do, this would convert the offering to common carriage subject to Title II. Instead, nondiscrimination safeguards for access to the transmission component of wireline broadband Internet access must, and should be, imposed under Title II.

C. Wireline Broadband Internet Access Service Is Already Subject to Title II

As discussed, the Commission has permitted cable operators to discriminate in provision of broadband access service and has determined erroneously that they are not subject to Title II. On the other hand, every facilities-based telephone company that offers wireline broadband Internet access service does so as a customer of its own offering of transmission service for a fee. As discussed in Section IV below, the Commission's rules require this result. Similarly, "integrated" wireline broadband Internet access service does not lawfully exist under the Commission's rules. Therefore, wireline broadband Internet access service is completely distinguishable from cable modem service because it is provided by means of a separate offering of telecommunications service. Whatever merit the Commission's conclusion may have in the *Cable Modem Declaratory Ruling* that cable modem service is a single "integrated" offering of an information service, it provides no guidance for wireline broadband Internet access service, because telephone companies are not permitted to provide the latter service on an integrated basis free from the obligation to provide a separate telecommunications service offering. For this reason as well, the *Cable Modem Declaratory Ruling* provides no guidance for this proceeding.

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[5] Comments of Cbeyond Communications, Inc., DSLnet Communications, Inc., El Paso Networks, LLC, Focal Communications, Inc., and Pac-West Telecom, Inc. ("Cbeyond et al. Comments") CC Docket Nos. 02-33, 95-20 and 98-10, filed May 3, 2002, at 12-13.

III. THE COMMISSION MAY NOT LAWFULLY RECLASSIFY THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICES AS PRIVATE CARRIAGE

As noted elsewhere in these reply comments, the statutory definitions of "telecommunications service" and "information service" do not provide any basis for converting the transmission component of wireline broadband Internet access service to "private carriage" because current rules requiring that it be offered as a telecommunications service subject to Title II are consistent with the statutory definitions. The *Cable Modem Declaratory Ruling*, even assuming it is correct, does not determine the issues in this proceeding because the transmission component of cable modem service has not been subject to Title II (again assuming that the Commission's determination to that effect in the *Cable Modem Declaratory Ruling* was correct). Further, as explained in the ISP Associations' initial comments, and not disputed by the BOCs in their comments, ILECs' offering of the transmission component of wireline broadband Internet access service meets all of the criteria of common carriage under *NARUC I* and *NARUC II.* [6] For these reasons, the Commission may not simply grant BOCs' requests for permission to discriminate against ISP competitors by redefining the transmission component of wireline broadband Internet access service as "private carriage."

That the Commission lacks authority to take this radical step is clear for other reasons as well. As explained in these reply comments, permitting ILECs to engage in the systematic discrimination against competing information service providers that would be permitted under

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[6] "A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." *NARUC I, supra*, 525 F.2d at 644. Even if the Commission were to base its decision solely on the goals of Section 706, it would have to find that Title II regulation of the broadband trans-

"private carriage" would not serve the public interest. Therefore, the Commission could not possibly justify this step on the basis that it is a good idea, although that would not be sufficient under the Act in any event.

Moreover, Congress premised the 1996 Act, including the various statutory definitions at issue in this proceeding, on the definitions of basic and enhanced services, and the regulatory framework governing those services, established in *Computer II* and *Computer III*.[7] Therefore, Congress assumed that BOCs would be subject to the fundamental nondiscrimination safeguard of providing information services only as customers of their own tariffed transmission services.

Congress could not have intended that the deregulatory goals of the Act be achieved by the blunt and inflexible definitional approach to deregulation apparently selected by the Commission in the *Cable Modem Declaratory Ruling,* because it specifically established a different mechanism for deregulating under Title II – forbearance. Section 10 of the Act permits the Commission to forbear from imposing certain regulations on telecommunications carriers and telecommunications services if such regulation is not necessary to ensure non-discriminatory and just and reasonable rates, terms and conditions, is not necessary to protect consumers, and is in the public interest.[8] However, the comments in this proceeding clearly demonstrate that the ILECs' provision of broadband transmission services fails to meet the Section 10 requirements for regulatory forbearance.[9] Title II regulation and the *Computer Inquiry* requirements are

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mission services is necessary to promote competition and to encourage further deployment of advanced services to all Americans.

[7] AT&T at 16 (citations omitted).

[8] 47 U.S.C. § 160.

[9] *See* AT&T at 27-28.

necessary to ensure non-discriminatory and just and reasonable rates, terms and conditions for broadband transmission services; is necessary to protect consumers, who otherwise will be negatively impacted by the ILECs' monopoly on this market; and thus, is in the public interest. Second, the purpose of Section 10 would be rendered meaningless if the Commission is permitted to simply reclassify certain ILEC services as private carriage rather than common carriage. Congress could not have intended this result. Rather, Congress recognized that such services should be deregulated through forbearance when appropriate, not reclassified.

As the California Commission warned:

> There is no evidence that Congress intended that the FCC could achieve the same [deregulatory] result prematurely by unilaterally redefining fundamental terms in the Act, and effectively nullifying section [10]. The FCC cannot accomplish by regulatory fiat what Congress alone has the authority to change.[10]

Congress did not adopt Section 10 only to have the Commission search for another means to deregulate regulated services on its own terms. Rather, Congress recognized that regulated services should be deregulated through forbearance, when appropriate, that meets the standards of Section 10. As the United Church of Christ, *et al.* states, defining broadband services as information services would unlawfully remove these services from the scope of Section 251 and 252 because this would amount to *de facto* forbearance in violation of the standards of Section 10.[11]

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[10] California PUC at 15.

[11] United Church of Christ *et al.* at 14.

In addition, as shown in the *NonDom Proceeding*,[12] the BOCs continue to possess market power in provision of wireline transmission facilities used to provide broadband services,[13] and, as explained below, ISPs' options for broadband Internet access are virtually non-existent. The BOCs' continued dominance and market power over key broadband facilities and services require that such services be regulated as common carriage under Title II. Contrary to Qwest's claims,[14] the BOCs' provision of wireline broadband transmission services by itself precludes private carriage and Title I "regulation" given their market power over these services. And, as noted by Congressman Markey (D-MA), "the '96 act was not a deregulation bill. It was a de-monopolization bill."[15]

In their comments, BOCs erroneously presume that the Commission has unlimited discretion to simply reclassify the provision of broadband transmission services as private carriage. Instead, for the foregoing reasons, the Commission may not deregulate broadband simply by decreeing that the transmission component of wireline broadband internet access is no longer common carriage but "private carriage" instead. Accordingly, the Commission should emphatically reject that approach to broadband deregulation.

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[12] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-260 (rel. Dec. 20, 2002).

[13] Cbeyond, *et al.* at 31; AT&T at 46-47.

[14] Qwest at 16.

[15] Telecommunications Competition and Broadband Deployment: Hearing of the Senate Commerce, Science and Transportation Committee, May 22, 2002 (statement of Rep. Markey (D-MA).

IV. THE COMMISSION'S TENTATIVE CONCLUSION THAT THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE IS NOT TELECOMMUNICATIONS SERVICE IS LEGALLY UNSOUND

A. The Commission's Rules Require ILECs to Provide Wireline Broadband Internet Access Via Telecommunications Service

The *Notice* fails to recognize that the Commission has already addressed the terms and conditions under which facilities-based common carriers may provide information services over their own facilities, and that the Commission has required these carriers to provide information services, including Internet access service, as customers of their own tariffed telecommunications services. Thus, the Commission requires carriers that "own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[16] A carrier would violate the Commission's rules if it attempted to provide wireline broadband information service over its own facilities other than as a customer of its transmission capability offered on a nondiscriminatory tariffed basis over its own facilities. In their comments, the BOCs generally acknowledge that the transmission component of wireline broadband Internet access service is a "telecommunications service" by virtue of the Commission's rules.[17] Accordingly, the tentative conclusion in the *Notice* that the transmission component of wireline

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[16] *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421 (citing *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 10 FCC Rcd. 13717, 13719 (1995) ("Frame Relay Order"); and *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

[17] SBC at 6.

broadband Internet access service is not a telecommunications service, but is only "telecommunications," is erroneous by virtue of the Commission's own rules that ILECs provide broadband information services as customers of their own common carrier transmission services. The *Notice*'s failure to recognize this renders its application of the statutory definitions of "information service" to wireline broadband Internet access service arbitrary and capricious. Accordingly, the Commission should not adopt its tentative conclusion that the transmission component of wireline broadband Internet access service is only telecommunications and not telecommunications service.

B. The Current Regulatory Framework Is Consistent With Statutory Definitions

The Commission's requirement that carriers offer information service over their own facilities as customers of their own tariffed telecommunications services is consistent with the statutory definition of "information service." That term is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making information available via telecommunications...."[18] "Telecommunications service" is defined in the Act as "the offering of telecommunications for a fee directly to the public...."[19] The *Notice* reasoned that when a carrier provides broadband Internet access service over its own facilities, it is using telecommunications, but not offering it to anyone, and that, therefore, the transmission component of wireline broadband Internet access is a telecommunications service. As discussed, however, by operation of the Commission's own rules, carriers offering broadband

[18] 47 U.S.C. § 153(20).

[19] 47 U.S.C. § 153(46).

Internet access service over their own facilities do so as customers of their own tariffed telecommunications service. Further, because "telecommunications service" by definition encompasses "telecommunications," wireline broadband Internet access service under the Commission's rules is offered via telecommunications as well as by means of a telecommunications service. Therefore, the current regulatory framework is completely consistent with the statutory definitions of "information service," "telecommunications," and "telecommunications service."

The *Notice*, therefore, seriously errs to the extent it assumes that the Commission must change the current regulatory framework governing wireline broadband Internet access service based on the statutory definition of "information service," "telecommunications service," and/or "telecommunications." Accordingly, these statutory definitions provide no basis for altering to any extent the current application of Title II and *Computer II* and *III* safeguards to wireline broadband Internet access service. It would be arbitrary and unlawful for the Commission to change the current regulatory framework governing wireline broadband Internet access service based on the view that this is required on the basis of the foregoing statutory definitions.

C. "Integrated" Wireline Broadband Internet Access Service Is A Fiction

BOCs urge the Commission in initial comments to accept the ridiculous and self-serving characterization of wireline broadband Internet access service as a "naturally" "integrated" service.[20] Similarly, they describe *Computer III* unbundling requirements as "artificial."[21] SBC

[20] SBC at 2, 15, 17.

[21] SBC at 6.

states that wireline providers should not be required to "artificially structure any of its broadband information services to create a separate telecommunications service offering."[22]

However, BOCs' characterization of "integrated" wireline broadband Internet access service as "natural" is no more than another way of obscuring their request for permission to exit the business of being common carriers and to discriminate in provision of basic telecommunications services. While BOCs may perceive regulation as an "unnatural" constraint on their incentive and ability to discriminate, this, obviously, does not justify the sweeping deregulation BOCs seek in this proceeding. Instead, for all the reasons stated in these and other parties' comments, the Commission may not, and should not, eliminate ILECs' status as broadband common carriers subject to *Computer III* and other safeguards against discrimination. While BOCs would like the ability to systematically discriminate as "private carriers," the Commission for all the reasons stated herein should not permit them to do so.

The ISP Associations emphasize that because of competitive safeguards, "integrated" provision of wireline broadband Internet access service is prohibited and does not exist. Therefore, the Commission's tentative conclusions in the *Notice* as to how the statutory definitions of "information service" and "telecommunications service" would apply to integrated wireline broadband Internet access service *are purely hypothetical* because no such integrated service can lawfully exist under current rules. The Commission should continue to prohibit this "integrated" provision of wireline broadband Internet access service because "integrated" provision of

[22] *Id.*

wireline broadband Internet access service is no more than another way of saying that ILECs should be free from fundamental common carrier obligations.

V. "PRIVATE CARRIAGE" REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND OF INTERNET ACCESS SERVICE WOULD CONTRADICT THE COMMISSION'S BROADBAND GOALS

A. Left to Their Own Devices, ILECs Would Delay Introduction of Broadband Services

A key premise underlying the Commission's tentative conclusions in the *Notice* is that the public interest would be promoted by deregulation of ILEC broadband services, and conversely that common carrier regulation of the those services is not necessary to promote the Commission's public interest goals.[23] As noted by the ISP Associations in their initial comments, however, the record does not justify *either* the conclusion that treating broadband Internet access as a non-common carrier service would promote deployment of those services, or that subjecting these services to common carrier regulation would discourage deployment. To the contrary, absent regulatory intervention, ILECs have strong incentives *not* to deploy new broadband services because new more efficient services would cannibalize legacy services and revenue streams.[24] For example, DSL service threatens revenues associated with the more costly alternative of a second residential line where incremental profit margins exceed 70%.[25] Since, in most instances, subscribers who receive DSL service cancel their existing second line, DSL technology threatens the low cost and high profit margins associated with second residential lines. For

[23] Under the *NARUC I* test, the Commission must consider whether it is "necessary or desirable in the public interest" for the service to be provided on a common carrier basis. *See* note 4, above.

[24] OISPA, TISPA, and WAISP at 56-61.

this reason, BOCs delayed introduction of DSL service until competition from CLECs forced them to introduce it. In fact, cable operators got a head start in provision of Internet access service to consumers because the BOCs wanted to maintain their second-line revenues, not because of unbundling or other regulatory obligations.

More broadly, apart from the very illustrative example of ILECs sitting on DSL technology until competition required them to offer it, ILECs do not welcome the trend toward packet-switched networks using IP to deliver all services. In that environment, it will be increasingly difficult for ILECs to charge current premium prices for voice and access services that are possible with the legacy circuit switched network. This is because it is possible to provide more services for a reduced price on packet-switched networks using IP. Innovative CLECs are already doing so.

In fact, ILECs may well face a less than bright financial future, as some observers have suggested, because of the inevitable undermining of existing revenue streams caused by the deployment of more efficient technologies. BOCs are experiencing negative line growth in part because digital technology reduces the need for circuit switched lines.[26] CLECs in contrast do not face this issue because they can deploy the most efficient technology initially.

However, ILECs can avoid the erosion of current revenues if they can forestall the competition that would require them to deploy new, more efficient technologies. In this connection, the strategy of ILECs in this and other proceedings in seeking to immunize broadband from any

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[25] *See* AT&T at 65.

[26] According to Verizon, ILECs have experienced negative line growth since 2001. Letter from Verizon to Secretary, CC Docket No. 02-33, June 24, 2002.

unbundling obligations is clear. If ILECs can prevent CLECs from being able to use broadband network elements more efficiently than do ILECs themselves, ILECs can preserve existing revenues. Obviously, however, this is not a sufficient reason for granting the ILECs' request. Instead, the Commission should promote unbundling to permit competing carriers to provide more and better services to consumers and businesses at more affordable prices, and thereby give the ILECs a real economic incentive to deploy their own broadband services.

B. ILECs are Rapidly Deploying Broadband Infrastructure

Despite their slow start, the initial comments confirm that the ILECs have already widely deployed broadband capability and plan to continue to install even more robust broadband capability in their networks.[27] Financial and network data released by the ILECs demonstrates that the ILECs have deployed and are continuing to deploy broadband facilities, including fiber in the loop.[28] The FCC's *Third Report on the Availability of High-Speed Advanced Telecommunications Services* lends additional support to this view in concluding that overall, the deployment of advanced telecommunications capability to all Americans is reasonable and timely and that the trend of investment in broadband facilities is expected to continue.[29] The vast majority of commenting parties, including state regulatory commissions, competitive local exchange carriers

[27] Cbeyond et al. Comments at 7-9.

[28] *Id.*

[29] *See Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, FCC 02-33 (2002) ("*Third Report*").

and Internet service providers, agree that there is no problem with the pace of ILEC broadband deployment.[30]

Moreover, ILECs continue to announce enormous growth in both broadband deployment and subscribers. For example, in responding to questions concerning the impact of the recent Supreme Court decision in *Verizon v. FCC*,[31] Ron Dykes, BellSouth Corp.'s Chief Financial Officer, said that BellSouth expects to have 1.1 million DSL customers by the end of 2002. This would represent an increase of 480,000 DSL customers as compared to the end of 2001, or a growth rate of greater than 74% in BellSouth's broadband customer base.[32]

SBC touts itself as the "nation's leading DSL provider" and "one of the tope five ISPs."[33] SBC describes its Internet network as one of the industry's largest, covering "virtually all of North America" and operating at "99.9 percent availability."[34] Ross Ireland, chief technical officer of SBC, stated that SBC expected to spend $8 to $9 billion on capital expenditures this year.[35]

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[30] *See* AOL Time Warner at 23; AT&T at 70; Arizona Consumer Council *et al.* at 12; Big Planet, Inc. at 60-61; Business Telecom, Inc. *et al.* at 58-59; Cbeyond Communications, LLC *et al.* at 9-10; Covad at 7-10; DSL.net Communications, LLC at 10; Earthlink, Inc., at 20-21; Florida Public Service Commission at 5; McLeodUSA Telecommunications Services, Inc. at 4-5; Mpower Communications Corp. at 6; Public Utilities Commission of Ohio at 33; Oregon Public Utility Commission at 1,3; Sprint at 7; TDS Telecommunications Corporation at 8; Time Warner Telecom at 8-9; US LEC at 54-56; Wisconsin Public Service Commission at 2.WorldCom *et al.* at 30.

[31] *Verizon Communications, Inc., et al. V. FCC*, 535 U.S. _____ (2002).

[32] BellSouth had 620,000 DSL customers at the end of 2001. *See id.*

[33] SBC Yahoo! Alliance At-A-Glance.

[34] *Id.*

[35] T*elecommunications Reports*, "SBC's Ireland: Rules of Road Will Shape Broadband's Future," June 17, 2002, at W-1.

In addition, despite the lagging economy, market analysts predict an increase in the growth of broadband access services, especially DSL technologies.[36] Specifically, analysts expect global broadband access revenues to grow from $93.4 billion in the year 2002 to $229.7 billion in the year 2008; an increase of nearly 69%.

The Commission should not place great weight on the ILECs' claim that the existing regulatory regime restricts their deployment of broadband services when their own data and press releases conflict with this position. Since ILECs are rapidly deploying broadband infrastructure there is no basis for concluding that "private carriage" regulation is necessary to promote investment.

C. The Supreme Court Has Recently Dispelled Any Notion That Regulation Has Disincentivized Broadband Facilities Investment

In light of the recent Supreme Court decision in *Verizon v. FCC*, the Commission can, and must, reject ILEC arguments that Title II regulation and unbundling obligations discourage investment in broadband facilities.[37] The Supreme Court recognized that the regulatory framework established in the 1996 Act and implemented by the Commission has resulted in extraordinary investment in telecommunications facilities. Since the passage of the 1996 Act, ILECs have invested over $100 billion and competitive carriers have invested over $55 billion.[38] The Commission should adopt the perspective of the Supreme Court that "a regulatory scheme that can boast such substantial competitive spending over a 4-year period is not easily described as an

[36] "Pioneer Consulting Predicts Market Opportunity for Global Broadband Access: Service Revenues to Reach $229.7 Billion (USD) by 2008)," June 18, 2002, <http://www.pioneerconsulting.com/-pressrelease.php3?report=41>.

[37] *See Verizon v. FCC*, at 32.

unreasonable way to promote competitive investment in facilities."[39] Accordingly, there is no basis for accepting generalized ILEC arguments that eliminating broadband unbundling obligations would promote investment.

Even assuming *arguendo* that Section 251(c)(3) unbundling obligations discouraged broadband telecommunications infrastructure investment by ILECs and/or CLECs, which is not the case, there is no reason to believe that requiring ILECs to provide information services as customers of *their own* tariffed transmission services would discourage such investment. CLECs use UNEs to compete with ILECs in provision of basic telecommunications services. In contrast, the *Computer II* and *III* unbundling obligations do not establish rights to use ILEC facilities to compete in the market for local telecommunications services, but instead provide for nondiscriminatory access to basic transmission services used by the ILEC for its own information services to assure that ILECs cannot leverage their control over the local network into control of the information services marketplace. These rules promote a vibrantly competitive market for information services, which also promotes demand for use of ILEC broadband transmission services, as found by the Commission in *Computer III*.[40] Therefore, application of Title II and *Computer II* and *III* safeguards to ILEC broadband transmission services promotes, rather than inhibits, broadband investment.

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[38] *See Verizon v. FCC*, at 46 n.33, p.45.

[39] *Verizon v. FCC*, at 46.

[40] *Policy and Rules Concerning the Interstate, Interchange Marketplace Implementation at Section 254(g) of the Communications Act of 1934, as amended,* 16 FCC Rcd. 7418 ("*CPE/Enhanced Services Unbundling Order*").

D. Demand for Broadband Services, Rather Than Supply, Governs the Pace of Broadband Deployment

Even if the Commission believed that further steps are necessary to stimulate the pace of broadband deployment, it should focus on issues relating to the demand for broadband services, rather than on supposed regulatory barriers to investment. As set out in the ISP Associations' initial comments, there is broad agreement throughout the industry that any issues associated with the pace of broadband deployment are attributable to the demand for broadband services.[41] The overwhelming majority of the commenting parties, including state regulatory agencies, consumer groups, competitive local exchange carriers, and Internet Service providers, take the same point of view in their comments.[42] Most parties question why there is a perceived need to dismantle the existing regulatory structure to create incentives for ILEC broadband deployment when all indications suggest that the pace of deployment is and will continue to be responsive to demand (and, it might be added, there is no evident public benefit in pressuring companies to deploy facilities for which demand does not exist). Accordingly, the initial comments show that if the Commission wishes to speed the deployment of affordable, high quality, broadband services to American consumers it should not deregulate ILEC provisioned broadband services but instead permit marketplace demand to govern the pace of deployment.

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[41] OISPA, TISPA, and WAISP at 56-61.

[42] *See* AOL Time Warner at 23; AT&T at 70; Arizona Consumer Council *et al.* at 12; Big Planet, Inc. at 60-61; Business Telecom, Inc. *et al.* at 58-59; Cbeyond Communications, LLC *et al.*, at 9-10; Covad at 7-10; DSL.net Communications, LLC at 10; Earthlink, Inc., at 20-21; Florida Public Service Commission at 5; McLeodUSA Telecommunications Services, Inc. at 4-5; Mpower Communications Corp. at 6; Public Utilities Commission of Ohio at 33; Oregon Public Utility Commission at 1,3; Sprint at 7; TDS Telecommunications Corporation at 8; Time Warner Telecom at 8-9; US LEC at 54-56; Wisconsin Public Service Commission at 2.WorldCom *et al.* at 30.

VI. INTERMODAL COMPETITION DOES NOT WARRANT PRIVATE CARRIAGE TREATMENT OF THE TRANSMISSION COMPONENT OF BOC'S WIRELINE BROADBAND INTERNET ACCESS

The Commission should reject BOC arguments that intermodal competition justifies elimination of their obligation to provide nondiscriminatory access to unbundled network elements or to broadband transmission services they use to provide their own broadband information services. First, even if it were true that BOCs face significant intermodal competition in broadband, this would mean at most that there is a duopoly. However, the Commission has never determined that a duopoly is a sufficient reason to eliminate or reduce common carrier obligations. The fact that BOCs and cable operators have been raising prices shows that there is no genuine competition for broadband Internet access services.[43] It is also worth noting that BOCs are affiliated with, or have significant marketing arrangements, with some of the companies with whom they allegedly compete such as MSN and Yahoo.[44]

Second, BOCs have failed to submit any information concerning intermodal competition other than for the consumer market for Internet access service. As cable modem-based Internet access is not marketed as a business service, U.S. businesses have virtually no other options but DSL. Thus, the BOCs' so-called "Fact Report" addresses competition in only the "mass market" (their term for residential consumers) and the large business market for broadband services, but virtually all of the cited competition for the business market is from other common carriers, *i.e.* it is not intermodal competition.

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[43] Sam Ames, *Look out! Broadband prices rising,* May 30, 2002, <<http://zdnet.com.com/2100-1105-928512.html>> (citing record cable and DSL price increases).

[44] <<www.sbc.com/Products_Services/data_sheet_08.pdf>>; <<http://www.atnewyork.com/news/article.php/8471_1143711>>.

Further, even with respect to the mass market, the "Fact Report" admits that only one-third of households currently have access to both cable modem and DSL service[45] and that "[i]n many markets in the U.S. today, only one or two of the four possible broadband alternatives is currently available."[46] This fact is alluded to in *Bringing Home the Bits:* "[O]verall availability masks considerable variability in competition at the local level – by state, by community, or even by household."[47] The California Public Utilities Commission emphasized that SBC is the dominant provider of broadband services to residential and small commercial customers in its service territory.[48] Specifically, the California Commission stated that 45% of Californians who live in areas with broadband capability have only DSL, not cable modem service, available. And even in areas where cable modem service is available, the physical plants generally do not overlap to give a *particular household* an actual choice between DSL and cable.[49] As the consumer advocates showed, cable dominates the residential broadband market (with a 75% market share) and DSL[50] dominates the non-residential market (with an 89% market share).[51] Finally, as the Florida Commission argued, because different broadband platforms have different availability and performance criteria, these platforms are not perfect substitutes for one another. To the

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[45] Verizon Attachment 1, Broadband Fact Report at 1.

[46] Verizon Attachment 1, Broadband Fact Report at 12.

[47] COMPUTER SCIENCE AND TELECOMMUNICATIONS BOARD, NATIONAL RESOURCE COUNCIL, BROADBAND: BRINGING HOME THE BITS, at p.188.

[48] California PUC at 34-37.

[49] California PUC at 35-36.

[50] The DSL market is clearly dominated by the BOCs. The DSL market is clearly dominated by the BOCs. *See High Speed Services for Internet Access: Subscribership as of June 30, 2001*, Industry analysis Div., CCB, Feb. 2002, Table 5 (reporting that RBOCs provide 86.4% of ADSL technologies).

[51] Arizona Consumer Council *et al.* at 59.

contrary, "consumers in markets with only one provider per technology platform for broadband service may really be faced with no choice at all, depending on their specific needs."[52]

Accordingly, there is no basis in the current record for the Commission to accept BOCs sweeping assertions that they face significant intermodal competition warranting deregulation. In reality, BOCs are seeking to use vague, exaggerated assertions of intermodal competition to justify permission to thwart intramodal competition. Accordingly, the Commission should reject BOC arguments on this issue.

VII. THE COMMISSION SHOULD REJECT BOC EFFORTS TO OBTAIN COMPLETE DEREGULATION THROUGH OVERLY BROAD DEFINITIONS OF "BROADBAND"

For all the reasons stated in these reply comments, there is no basis for concluding that deregulation would promote provision of "broadband." In fact, the freedom to discriminate against competitors that would be accorded to BOCs in any substantial deregulation would slow broadband development by both BOCs and competitors because BOCs could thwart competition instead of appropriately responding to it by reducing prices and providing more service options, and because competitors would be denied essential access to BOC bottleneck facilities. Because there is no reason to deregulate "broadband," there is little point in debating in this proceeding an appropriate definition of it.

However, it is worth observing that BOCs urge the Commission to accept definitions and approaches to broadband that would virtually guarantee that BOCs would be completely de-regulated in short order given industry trends. Thus, SBC contends that "the *Computer Inquiry*

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[52] Florida PSC at 4.

service-unbundling requirements are unnecessary not only for broadband Internet access, but also for any packetized broadband information service."[53] Similarly, Verizon urges that:

> The Commission should expand its definition to cover these new services in order to eliminate regulatory obstacles to the development and deployment of such new technologies.... A broadband service is either a service that uses a packet-switched or successor technology, *or* a service that includes the capability of transmitting information that is generally not less than 200 kbps in both directions.[54]

In short, it appears that the BOCs would like the Commission to adopt a new statutory definition of broadband, packetized networks and services that would escape Title II regulation regardless of their classification as telecommunications services. Important business services subsumed by this definition include ATM, Frame Relay, gigabit Ethernet, and other like services. The majority of U.S. businesses would then have only one vendor for these services, if the BOC proposed monopoly is enforced.

Moreover, as pointed out in many initial comments, basing deregulation on the speed of a digital service, especially at the low speeds suggested by BOCs, would mean that BOCs could obtain deregulation of all services merely by providing them on a digital basis or over high speed digital networks. Because BOCs can justify increasing use of packet switching technology merely on the basis of cost savings in providing existing services (although they will not want to lower prices), using the BOCs' suggested definitions of broadband as the basis for deregulation would virtually guarantee complete deregulation of all BOC services, including voice. SBC

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[53] SBC at 23.

[54] Verizon at 5-6.

recently announced that it is rolling out an IP Centrex service.[55] Although Centrex is currently a telecommunications service subject to regulation, the BOCs' overly broad definition of broadband, if adopted, might well convert this to an unregulated offering. As pointed out in initial comments, industry observers have predicted that the circuit switched network will soon be replaced by a network providing all services as applications traveling over digital packet-switched facilities using IP protocol.[56] In fact, some CLECs are already doing so, which enables them to provide more service for less than what ILECs charge.[57] In this environment, all services, including voice, will be merely different software defined applications traveling over digital packetized transmission services. Moreover, there will be in this environment no meaningful distinction between the network and the Internet. Rather, the Internet will be the network. Accordingly, the Commission should reject the BOCs' self-serving definitions of "broadband" as having any utility in this proceeding.

VIII. "BROADBAND" IS NOT A SEPARATE NETWORK

The Commission should also reject as false BOCs' contention that their broadband transmission capability is a separate network that may, or should, be free from Title II regulation. While BOCs suggest in this proceeding that their broadband capability is separate from the existing network, this is contradicted by BOCs' own statements. Verizon states that "most local wireline network facilities are used to provide telecommunications services as well as informa-

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[55] "SBC to Take Centrex Into the Wide World of IP," Telephony, June 3, 2002.

[56] The Local Exchange Network in 2015, Lawrence K. Vanston, Ph.D., Technology Futures, Inc. 2001.

[57] *See* Comments of Association of Local Telecommunications Services, *et al*, CC Docket No. 01-338, filed April 5, 2002, p. 14.

tion services."[58] And BellSouth boasts that it is "systematically transforming our core network from narrowband analog voice to broadband digital data ... through a disciplined strategy that targets investment and leverages capital into next-generation technologies and assets...."[59] The Florida Commission agreed, arguing that the "local exchange market and the broadband market is inextricably joined."[60] BOC broadband facilities travel through the same wire centers and offices as the existing network, use the same rights of way and conduit, and are serviced and managed by the same personnel. In addition, contrary to the BOCs' arguments, ILECs are not "relative newcomers in the broadband market."[61] BOCs' networks have contained a "broadband" capability for years in the form of special access and other high speed services.[62] ILEC's recent broadband investments are no more than the current phase of on-going upgrades to the existing network.

Accordingly, the Commission should reject BOCs' view that deregulation of broadband is appropriate because it is a separate or new capability.

IX. WHOLESALE BROADBAND SERVICES ARE TELECOMMUNICATIONS SERVICES

Qwest argues that the ISPs who purchase broadband transmission services from the ILECs are not the "public" for purposes of the common carrier classification.[63] This argument is

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[58] Verizon at 41.

[59] BellSouth 2001 Report to Shareholders at 6.

[60] Florida PSC at 6.

[61] Qwest at 31.

[62] Indeed, BOCs have been using HDSL technology for a number of years to provide T-1 special access and private line services.

[63] Qwest at 17.

plainly wrong as a matter of law. The term "public" for purposes of the common carrier classification is not limited to the public as a whole. The definition of telecommunications services specifically states that these services can be offered to "such classes of users as to be effectively available to the public."[64] Not surprisingly, it is common knowledge that ISPs, almost without exception, market their services to the public; certainly, the members of the ISP Associations uniformly do so. Moreover, the Supreme Court has recognized that such a general offering to the public can even involve a small and narrowly defined class of users,[65] leaving no doubt that ISPs are members of the public for purposes of this classification.[66] Accordingly, wholesale broadband services offered to ISPs are offered to the "public," and, therefore, are telecommunications services under the Act.

X. THE COMMISSION MUST MAINTAIN TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE IN ORDER TO MEET NATIONAL SECURITY, NETWORK RELIABILITY, AND CONSUMER PROTECTION GOALS AND REQUIREMENTS

As set out in the initial comments of the ISP Associations, classifying wireline broadband Internet access services as an information service with a telecommunications component would adversely affect the obligations of telecommunications service providers concerning national security, network reliability and consumer protection.[67] Aside from the BOCs, all parties that

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[64] 47 U.S.C. § 153(46). The Court of Appeals for the District of Columbia Circuit has affirmed the Commission's interpretation of this definition as a codification of the *NARUC I* and *II* test. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999), *aff'g In re AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998).

[65] *See* AT&T at 19 (citing *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1916)).

[66] NewSouth at 12-13.

[67] Cbeyond, at al. Comments at 41-47.

submitted comments on this subject agreed that such a classification would undermine important national security, network reliability, and consumer protection goals.

A. National Security

Comments submitted by the Secretary of Defense highlight the adverse impact that classifying wireline broadband Internet access services will have on national security and emergency preparedness. The Secretary of Defense makes clear that national security and emergency preparedness communications functions will be best served if the provisioning of wireline broadband Internet access remains classified as a telecommunications service that can be regulated by the FCC under Title II of the Act.[68] The Secretary of Defense cautions that any other classification will require the adoption of new rules to ensure continued function of the national security and emergency preparedness in the wireline broadband Internet access service context.[69] Clearly, national security and emergency preparedness concerns will be better served by Title II regulation of wireline broadband Internet access services.

The majority of parties raise similar concerns relating to CALEA that arise in the context of national security and emergency preparedness. The Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI"), along with numerous competitive carriers and Internet service providers, comment that CALEA extends only to telecommunications carriers.[70] As noted in the DOJ/FBI comments, classifying wireline broadband Internet access as an information service with a telecommunications component threatens to deny law enforcement a lawfully

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[68] *See* Secretary of Defense at 2-3.

[69] *See* Secretary of Defense at 2-3.

mandated point of access for conducting interception of communications and related information using this technology.[71] Exempting wireline broadband Internet access service providers from CALEA would be "contrary to the Commission's prior holding and to law."[72] The DOJ/FBI and the competitive carriers highlight the fact that the statutory and legislative history of CALEA make clear that Congress did not intend for the exemption pertaining to "information services" in CALEA to result in exempting wireline broadband transmission networks from its ambit.[73] The DOJ/FBI emphasizes that the intent of CALEA was to make it applicable to equipment used to connect to the Internet, regardless as to whether a person used a dial-up or broadband connection to gain access.[74] Classifying wireline broadband Internet access as an information service with a telecommunications component would result in the illogical conclusion that dial-up Internet access is subject to CALEA, while wireline broadband Internet access to CALEA is not. Furthermore, if the Commission adopted the BOCs definitional approach that packet networks are exempt from Title II, and the BOCs replace their circuit switches with packet switches, the BOCs would have no requirement to comply with CALEA.

Even though SBC and Verizon agree with each other that classifying wireline broadband Internet access services as an information service with a telecommunications component would

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[70] *See* Big Planet, Inc. at 47-48; Business Telecom, Inc. at 28-29; Department of Justice and Federal Bureau of Investigation at 1; DirecTV Broadband, Inc. at 37-38; Time Warner Telecom at 28.

[71] *See* Department of Justice and Federal Bureau of Investigation at 6.

[72] *See* Department of Justice and Federal Bureau of Investigation at 6.

[73] *See* Big Planet, Inc. at 47-48; Business Telecom, Inc. *et al.* at 28-29; DirecTV at 37-38

[74] *See* Department of Justice and Federal Bureau of Investigation at 12.

exempt such services from CALEA,[75] each attempts to minimize the issue by stating that facilities used to provide both broadband and traditional voice services are subject to CALEA.[76] However, this argument ignores the fact that technological convergence or migration from the traditional telecommunications networks to broadband networks make it much more difficult to distinguish between voice and data. In the not so distant future, the Internet will be the network, which could threaten to completely undo CALEA requirements under the definitional approach to deregulation set forth in the Notice.[77] Verizon alludes to this problem by recognizing that classifying wireline broadband Internet access services as an information service with a telecommunications component could lead to exempting DSL service from CALEA.[78] It would necessarily follow that even voice traffic transmitted over DSL facilities would thereby evade CALEA, which surely was not what Congress intended. Therefore, the Commission should refrain from removing wireline broadband Internet access from Title II requirements.

B. Network Reliability

For the same reasons detailed above, network reliability and interconnectivity concerns will be better served if wireline broadband Internet access is subject to Title II of the 1996 Act. Network reliability and interconnectivity regulations are limited to "telecommunications services." If the Commission were to classify wireline broadband Internet access services as an information service with a telecommunications component, none of the rules that address net-

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[75] *See* SBC at 38; Verizon at 41.

[76] *See* Verizon at 41.

[77] *See* Big Planet, Inc. at 48; Business Telecom, Inc. at 28-29; DirecTV Broadband, Inc. at 37-38; Mpower Communications at 12; Time Warner Telecom at 28.

[78] *See* Verizon at 41.

work reliability and interconnectivity would be applicable to wireline broadband Internet access services.[79]

C. Consumer Protections

There is universal agreement among the state commissions, consumer advocates, competitive carriers and Internet service providers that classifying wireline broadband Internet access services as an information service with a telecommunications component will adversely impact consumer protection regulations.[80] Regulations concerning discontinuance of service, restrictions applicable to customer proprietary network information, rules relating to truth-in-billing, and safeguards against slamming would cease to apply to wireline broadband Internet access services. All of these protections apply based on the offering of a telecommunications service by a common carrier. The Notice threatens to eviscerate all of these important consumer protections.

BOCs attempt to minimize the negative impact that classifying wireline broadband Internet access services as an information service with a telecommunications component would have on consumer protection regulations. SBC and Verizon dismiss such concerns by stating that since carriers will continue to provide voice or other telecommunications services to most of

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[79] *See* Big Planet, Inc. at 48; Business Telecom, Inc. at 30; DirecTV Broadband, Inc. at 39-40; Time Warner Telecom at 28-29.

[80] *See* Alliance for Public Technology at 6-7; Big Planet, Inc. at 48-51; Business Telecom, Inc. at 30-33; Calif. Pub. Utils. Comms'n at 42; Covad Communications Company at 77; DirecTV Broadband, Inc. at 39-41; Minn. Dept. of Commerce at 7; Penn. Consumer Advocates, et al at 23; Rehabilitation Engineering Research Center on Telecommunications Access at 2,4-5; Texas Attorney General Comment, at 5; Texas Pub. Util. Comm'n at 2,4; Time Warner Telecom at 28-29; Vermont Pub. Serv. Board, at 6.

their customers, the Title II customer protections will continue to apply.[81] However, as emphasized in Section VII above, the technological convergence from the traditional voice networks to broadband networks will provide an excuse for BOCs to claim that even voice should be deregulated. As noted by one state commission, it is a safe assumption that the ILECs will argue that the provision of any service, even traditional voice, over broadband facilities is removed from all state consumer protection requirements.[82] There is no reason to believe that the same argument could not be leveled at federal consumer protection requirements as well.

The protections afforded by section 255 of the 1996 Act to ensure access for persons with disabilities would also become inapplicable if the Commission classified broadband Internet access as an information service with a telecommunications component. Numerous advocacy groups, competitive carriers and ISPs recognized that classifying wireline broadband Internet access services as an information service with a telecommunications component would eliminate important protections contained in Title II of the Act.[83] While Verizon does not directly address the concerns associated with eliminating protections for persons with disabilities, its comments seem to suggest that the Commission could simply adopt new regulations through its ancillary jurisdiction under Title I of the 1996 Act.[84] However, it is unclear whether the Commission could assert its jurisdiction under Title I to impose such regulations. The Commission's ancil-

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[81] *See* SBC at 40-41; Verizon at 42.

[82] *See* Minn. Dept. of Commerce at 7.

[83] *See* Alliance for Public Technology at 6-7; Big Planet, Inc. at 48-51; Business Telecom, Inc. at 30-33; Covad Communications Company at 77; DirecTV Broadband, Inc. at 39-41; National Association of the Deaf at 2; Penn. Consumer Advocates, et al at 23; Rehabilitation Engineering Research Center on Telecommunications Access at 2,4-5; Rehabilitation Engineering Research Center on Telecommunications Access at 4-5; Telecommunications for the Deaf, Inc. at 8-9; Time Warner Telecom at 28-29.

lary jurisdiction under Title I is undefined and there is nothing in the 1996 Act to suggest that Congress meant to leave the Commission plenary power to regulate whatever it sees fit through such ancillary jurisdiction. It is equally unclear how the Commission would simply assert Title I ancillary authority to extend basic consumer protections applicable to Title II services to Title I services.[85] Protections for people with disabilities should not be dismissed as resolvable through a statutory provision that is ambiguous as to the extent of the authority it actually provides the Commission. Perhaps one commenting party summed up the situation best by stating that the impact of classifying wireline broadband Internet access services as an information service with a telecommunications component on consumer protections is "just a shot in the dark."[86]

D. Intermodal Competition Will Not Sufficiently Protect Consumers

Aside from the BOCs, every party that commented on the ability of intermodal competition to regulate consumer protection agreed that intermodal competition would not be sufficient to protect consumers, nor would it result in the deployment of quality and affordable broadband services to American consumers.[87] Aside from the flaws associated with the imperfect substitution of broadband services between platforms, there are many other characteristics of the broadband services marketplace indicating that intermodal competition will not be effective in curbing monopoly abuses.

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[84] *See* Verizon at 42.

[85] Calif. Pub. Utils. Comm'n at 43.

[86] Covad at 77.

[87] *See* Business Telecom, Inc. at 33-34; Calif. Internet Service Providers Assoc., at 26-27; Calif. Pub. Utils. Comms'n at 41; DirecTV Broadband, Inc. at 33-34; Earthlink, Inc. at 29; KMC and NuVox at 23; Minn. Dept. of Commerce at 7; New Hampshire ISP Assoc. at 8; Texas Attorney General at 5; Texas Pub. Util. Comm'n at 2,4; Vermont Pub. Serv. Board, at 12-13; WorldCom Inc., *et al.*, at 25.

The ILECs attempt to argue that intermodal competition will act as a counterbalance to discriminatory behavior by any one platform provider of broadband services. As discussed in Section VI above, however, so-called "intermodal competition" is largely illusory when viewed at a granular, local level instead of relying on broad national market share data. In light of these facts, all of the state regulatory commissions agree that ILECs should continue to be regulated in their provision of broadband services.[88]

XI. COMPUTER INQUIRY SAFEGUARDS REMAIN NECESSARY TO PREVENT DISCRIMINATION BY ILECs

The *Computer Inquiry* requirements were established specifically to address the discrimination and anticompetitive concerns surrounding the ILECs' control over bottleneck transmission facilities that are essential to the development of a competitive information services market. Because the Commission has specifically found that such concerns still exist in the information services market, it has imposed the *Computer Inquiry* requirements on advanced services, including high speed transmission services.[89] Contrary to the BOCs' arguments, there have been no dramatic changes in the market or regulatory landscape that would warrant removal of these *Computer Inquiry* safeguards.[90] Nor are there technological distinctions with broadband services that would justify a different regulatory regime.[91] Indeed, the *Computer Inquiry* decisions were

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[88] *See* California Public Utilities Commission at 36; Michigan Public Service Commission at 2; Minnesota Department of Commerce at 7; New York State Dept. of Pub. Serv. at 2-3; Oregon Public Utility Commission at 2-3; Public Utilities Commission of Ohio at 33; Texas Attorney General's Office at 4; Vermont Public Service Commission at 6-9; Wisconsin Public Service Commission at 2.

[89] Cite Frame Relay Order; CPE/Enhanced Services Unbundling Order.

[90] *See* Cbeyond *et al.* at 50-60; AT&T at 40-42.

[91] *Id.*

crafted purposely to take into account advanced and future information services. Thus, the requirement that the ILECs unbundle the underlying transmission component from the information services and offer transmission capacity to unaffiliated ISPs under the same tariffed terms and conditions under which they provide such services to their own ISPs, applies to broadband services as well.

The BOCs argue that intermodal and intramodal competition justify elimination of the *Computer Inquiry* safeguards.[92] This argument, however, is misplaced.[93] The *Computer Inquiry* safeguards were implemented to protect ISPs from discriminatory rates, terms, and conditions governing access to the underlying transmission capacity upon which the ISPs are dependent to provide their information services. Contrary to Qwest's statement,[94] ISPs cannot simply turn to competing CLECs, cable modem providers and satellite providers for the broadband transmission needed for their Internet access services. The CLECs have faced formidable barriers to entry in building their networks and have nowhere near the extensive ubiquitous network, especially the critical "last mile," that the ILECs possess. Moreover, the cable operators and satellite providers are not required to provide ISPs access to their transmission facilities.[95] Thus, the

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[92] BellSouth at 16; Qwest at 26.

[93] As demonstrated in the majority of the comments filed in this proceeding, intermodal and intramodal competition does not exist on a level sufficient to alleviate the anticompetitive and discriminatory concerns underlying the Computer Inquiry requirements. Despite the BOCs' claims, intramodal competition is scant at best. As of June 30, 2001, competing local exchange carriers only provided 7% of the ADSL high speed lines, while the BOCs provided nearly 87%. *See* "High-Speed Services for Internet Access: Subscribership as of June 30, 2001," Industry Analysis Division, Common Carrier Bureau, Feb. 2002, Table 5. As for intermodal competition, ISPs simply do not have access to the facilities of other broadband providers, such as cable, satellite and wireless.

[94] Qwest at 23.

ILECs' network continue to be "the primary, if not exclusive, means through which information service providers can gain access to customers."[96] This core assumption underlying the *Computer Inquiry* requirements remains valid today.

BellSouth also argues that applying the *Computer Inquiry* rules to only one broadband provider is anticompetitive and discriminatory.[97] BellSouth argues that no other broadband providers are subject to the unbundling requirement in the provision of broadband services and that deployment of broadband will only occur if there is a "level playing field in a de-regulatory environment.[98] On the latter point, it already has been amply demonstrated that broadband deployment is occurring in a "reasonable and timely fashion" despite the *Computer Inquiry* requirements and Title II regulation. As for the former point, it is widely recognized that different service providers may be subject to varying regulations in order to recognize the differences between them and that different regulatory regimes may be necessary to promote competition.[99] Even assuming that the Commission's decision in its *Cable Modem Declaratory Ruling* was correct, the need for common carrier regulation of the ILECs' dominant services and facilities remains. Unless significant changes have occurred in the ILECs' control over wireline transmis-

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[95] While a few cable operators may be offering one or two ISPs access to their cable transmission facilities, this is a far cry from the hundreds of ISPs that have access to their customers through the ILECs' common carrier transmission facilities. *See* Qwest at 30 (offering consumers access to over 400 independent ISPs).

[96] *Notice* at ¶ 36.

[97] BellSouth at 19.

[98] *Id.*

[99] *Third Section 706 Report*, 17 FCC Rcd. at ¶133.

sion facilities, which is not the case, then the ILECs must continue to be regulated as the monopolists they are.

In its comments, Qwest makes the following statement:

> As the Commission has observed, [the] *Computer II* unbundling rule was designed specifically to address the 'service and market characteristics prevalent' in the local exchange market more than a decade ago. Those market characteristics included complete or near-complete ILEC dominance of the only 'basic transmission service' potentially available for the provision of enhanced services. In particular, the *Computer II* unbundling rule was designed to prevent carriers from using their '*market power* and control over the communications facilities *essential to the provision of enhanced services*' to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market. Indeed, ILECs were often then the *only* providers of the services that the information service provider required, and 'nondiscriminatory access ... to basic transmission services by all enhanced service providers' was necessary given that that [sic] enhanced services were at that time '*dependent* upon the common carrier offering of basic services.'[100]

Although Qwest does go on to argue that the ILEC monopoly conditions it describes above do not exist in today's broadband market and that the *Computer Inquiry* rules are unnecessary, Qwest is wrong. Rather, Qwest's description of the justification for the *Computer Inquiry* rules summarizes quite nicely the current market conditions and the need for retention of those rules. Contrary to the BOCs' claims,[101] they do have bottleneck control over networks used to deliver broadband access. As the Commission itself recognizes and as demonstrated in this proceeding, the ILECs are still dominant in the local exchange market and exchange access market and broadband services are provided over these same local exchange and exchange access facili-

[100] Qwest at 25-26 (citations omitted).

[101] SBC at 24; Qwest at 34-35.

ties.[102] Moreover, ISPs do not have ready access to other facilities in the provision of their Internet access services and are still dependent upon these essential ILEC bottleneck facilities to provide their services.[103] These assessments were made recently by the Commission, not just a decade ago. Without regulatory safeguards, such as the *Computer Inquiry* rules and Title II, the BOCs will use their "*market power* and control over the communications facilities *essential to the provision of enhanced services*' to discriminate against unaffiliated information service providers in order to obtain anticompetitive advantages in the information services market."[104]

Given that the Commission and the industry have fought for decades to introduce competition in the local exchange market, it is hard to believe that somehow, miraculously, in the last six months that the ILECs have relinquished control over their bottleneck transmission facilities. The bottom line is that the core assumptions underlying the reasons for implementation of the *Computer Inquiry* rules still apply today and, thus, retention of the *Computer Inquiry* safeguards are critical to the future of the broadband information services market.

The BOCs argue that they have an incentive to offer consumers a choice of ISPs and to make the necessary service elements available to them.[105] The BOCs argue that customer loyalty to their ISP of choice will drive this incentive. If this were true, however, then why are there not

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[102] Cbeyond, *et al.* at 31 (citing Separate Statement of Chairman Michael K. Power, CC Docket No. 01-337, at 1 (rel. Dec. 10, 2001).

[103] As pointed out in the comments, technological differences between narrowband and broadband do not serve as the basis for the *Computer Inquiry* rules. Rather, ILEC control over the local loops and high speed transmission facilities is the key factor; control which still exists today. Moreover, much of the ILECs' broadband networks consist of routine upgrades, and are not, as the ILECs suggest, completely separate and new network facilities designed solely for broadband services.

[104] Qwest at 25.

[105] Qwest at 27-28, 30.

more ISPs gaining access to their customers over cable systems? A very limited number of ISPs have such access and not all cable companies are providing this access, given that they operate under a regulatory regime that does not require such access. Indeed, the cable companies have only provided access to independent ISPs under extreme pressure from regulators and consumer groups. Moreover, as the experience with the cable companies demonstrates, only the few largest of ISPs will have the bargaining power to enter into reasonable and non-discriminatory arrangements with the dominant ILECs, if at all. Clearly, the ILECs have countervailing incentives as monopolists to discriminate against competitors in the information services marketplace by denying access or condition access on unreasonable prices, terms and conditions. It is a virtual certainty that, absent regulation, Qwest, for example, will not be offering its transmission services on non-discriminatory terms and conditions to over 400 independent ISPs like it does now as a common carrier.[106] And, for those few ISPs that are able to obtain such access, it certainly will not be under the same terms and conditions that the ILEC-affiliated ISPs enjoys. For example, SBC has recently rebranded its dial-up Internet access service as "SBC Yahoo!" as part of a venture with Yahoo, a large content provider. It would be disingenuous to think that SBC will treat competing ISP's on a parity basis with SBC Yahoo. Thus, without the *Computer Inquiry* safeguards, the Commission will see a dramatic change in the information services landscape. The innovative, vibrant and extremely competitive information services market will shrivel to a few large ISPs lucky enough to gain access to ILEC bottleneck facilities. The

[106] Qwest at 30.

ILECs, with a demonstrated history of little action in innovation and deployment of new technologies and services unless subject to competition, will control this market.

Finally, other parties in this proceeding have recommended that the Commission revise and/or impose stricter enforcement on the *Computer Inquiry* requirements.[107] The ISP Associations support stricter requirements for the BOCs under the *Computer Inquiry* rules that would make the BOCs more accountable for their obligations to provide the underlying transport of bundled transmission and information services to competing ISPs on non-discriminatory terms and conditions. ISP Associations support suggestions for performance metrics, audits and enforcement penalties to ensure that the BOCs comply with the *Computer Inquiry* rules.

XII. THE IMPACT OF THE COMMISSION'S PROPOSALS ON UNIVERSAL SERVICE FUNDING FURTHER EXPOSES THEIR INCONSISTENCY WITH THE STATUTE

A. The BOCs' USF Arguments Expose the Stark Self-Interest of Their Proposal To Reclassify ILEC Broadband Services From Telecommunications Services To Information Services

BellSouth and SBC each unabashedly take highly inconsistent positions in their comments concerning the regulatory classification of broadband services. When it comes to the broadband transmission services they provide to ISPs and end users, in order to escape regulation they argue that broadband services are neither telecommunications services nor telecommunications. Yet when it comes to which providers should support universal service, subsidies which go predominantly to ILECs, they reverse course and argue that cable modem and ISP broadband providers should be considered providers of telecommunications that must contribute to USF.

[107] Earthlink at 31-35; AT&T at 56-61.

For example, at the same time that BellSouth argues its broadband Internet access service is an information service, it claims that the ISPs who offer this service to their customers are "by definition ... providers of interstate telecommunications."[108] This exposes the absurdity of BellSouth's self-serving position on the statutory classification issue. How can a BOC providing broadband Internet access provide only an information service but an ISP providing broadband Internet access provide telecommunications? The BOCs cannot have it both ways. Wireline broadband Internet access either includes the provision of telecommunications (or a telecommunications service) or it does not.

As the ISP Associations and others have shown, ILEC wireline broadband Internet access does in fact include the provision of a telecommunications service, or, at the very least, the provision of telecommunications. The BOCs' self-serving attempt to broaden the USF contribution base by capturing previously unregulated services at the same time they inconsistently seek complete deregulation of their own offerings only proves the absurdity of their argument that the Commission may reclassify wireline broadband Internet access service as a unitary information service. For all of the reasons specified in initial comments, and in order to ensure the sufficiency of USF, the Commission should reject its tentative conclusions in the *Notice* and determine that ILECs' provision of wireline broadband Internet access includes the provision of a telecommunications service that is subject to Section 251, the *Computer Inquiry* requirements, and USF contribution obligations.

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[108] *Cf.* BellSouth at 10-11 and BellSouth at 31. *See also* SBC at 45 ("all providers of telecommunications, including . . . ISPs and other content providers" should contribute to USF) and at 17 ("For the same reasons as in the cable modem context, wireline broadband Internet access services *uses* 'telecommunications'") (emphasis in original).

B. The Commission May Not Use This Proceeding to Determine that IP Telephony or VOIP Is a Telecommunications Service that Is Subject to Universal Service Contribution Obligations

In Section IV of the *Notice*, the Commission seeks comment on "what universal service contribution obligations such providers of broadband Internet access should have as the telecommunications market evolves, and how any such obligations can be administered in an equitable and non-discriminatory manner."[109] It also asks whether commenters expect voice traffic to migrate to broadband Internet platforms and if so, what the impact of such migration would be on the Commission's ability to support USF.[110] Not surprisingly, certain ILEC interests are attempting to use this proceeding to sweep IP telephony and Voice over Internet Protocol ("VOIP") into the category of a regulated telecommunications service and to subject such services to USF contribution obligations.[111] The Commission has rejected such efforts before and it must do so again in this proceeding.

The Commission did not seek comment on whether IP telephony or VOIP is a telecommunications service or information service. As the Commission has previously determined, it should not and will not classify such services as telecommunication services unless and until it has a complete record on which to evaluate the nature of the services.[112] Any characterization of an evolving IP service for regulatory purposes without a detailed analysis would be futile and prejudicial. As the Commission previously found:

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[109] *Notice* at ¶ 66.

[110] *Notice* at ¶ 82.

[111] *See* NECA at 4-5, FW&A at 22-23.

[112] *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd. 111501, ¶ 90 (1998).

> [w]e defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.[113]

The Commission has also addressed ILECs' attempts at back-door regulation of IP telephony and VOIP in the context of a universal service proceeding:

> [T]his Commission in its *April 10, 1998 Report to Congress* considered the question of contributions to universal service support mechanisms based on revenues from Internet and Internet Protocol (IP) telephony services. We note that the Commission, in the Report to Congress, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony.[114]

The record in this proceeding focuses on what USF obligations should be imposed on providers of wireline broadband Internet access services. The record necessary to define IP telephony and VOIP,[115] and to determine whether such services are telecommunications services that should be subject to a host of regulatory requirements, did not exist in the *Report to Congress* or the *Telecommunications Reporting Worksheet* proceeding and does not exist in this proceeding. A hasty and uniformed decision in this proceeding could negatively impact a

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[113] *Id.*

[114] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶22 (rel. July 14, 1999) (footnotes omitted).

[115] As the Commission has previously recognized, these broad service categories may include many different types of services, including computer-to-computer, computer-to-phone, and phone-to-phone.

number of other important policy objectives. For instance, it could undermine the United States' position that IP telephony should not be subject to international regulation or the international settlements regime.[116] Because the implications of determining that IP telephony or VOIP are telecommunications services subject to USF obligations would extend far beyond this proceeding, the Commission should affirm its prior findings that such a determination will not be made unless and until a more complete record is developed on individual service offerings.

[116] *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, ¶ 93 (rel. April 10, 1998) ("*Report to Congress*").

XIII. CONCLUSION

For the reasons stated herein, the Commission should conclude this proceeding consistent with the ISP Associations' recommendations.

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